

**United States Department of Labor
Employees' Compensation Appeals Board**

A.R., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
City of Industry, CA, Employer**

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**Docket No. 21-1000
Issued: March 25, 2022**

Appearances:

Manuel B. Madrid, for the appellant¹

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge

JANICE B. ASKIN, Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 21, 2021 appellant, through counsel, filed a timely appeal from an April 29, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP).² Pursuant to the

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² Appellant submitted a timely request for oral argument before the Board. 20 C.F.R. § 501.5(b). Pursuant to the Board's *Rules of Procedure*, oral argument may be held in the discretion of the Board. 20 C.F.R. § 501.5(a). In support of his oral argument request, appellant asserted that oral argument should be granted because it would provide an opportunity to further explain his need for waiver of the overpayment. The Board, in exercising its discretion, denies appellant's request for oral argument because arguments on appeal can be adequately addressed in a decision based on a review of the case record. Oral argument in this appeal would further delay issuance of a Board decision and not serve a useful purpose. As such, the oral argument request is denied and this decision is based on the case record as submitted to the Board.

Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.⁴

ISSUES

The issues are: (1) whether OWCP properly found that appellant received an overpayment of compensation in the amount of \$10,573.82 for the period October 28, 2019 through July 18, 2020 for which he was without fault because he concurrently received FECA wage-loss compensation benefits and Social Security Administration (SSA) age-related retirement benefits without appropriate offset; (2) whether it properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly found that appellant abandoned his request for a prerecoupment hearing.

FACTUAL HISTORY

On December 7, 2017 appellant, then a 64-year-old maintenance mechanic, filed an occupational disease claim (Form CA-2) alleging that he developed bilateral shoulder conditions due to factors of his federal employment, including heavy lifting, and repetitive reaching and pulling. He did not stop work. On May 10, 2019 OWCP accepted the claim for bilateral complete rotator cuff tears or ruptures of the shoulders, calcific tendinitis of the right shoulder, and impingement syndrome of the left shoulder.

On October 24, 2019 appellant filed a claim for compensation (Form CA-7) for disability beginning October 28, 2019. He noted that he had applied for SSA age-related retirement benefits at age 66 and received SSA benefits beginning on January 1, 2019 in the amount of \$2,388.00 a month. Appellant indicated that he was covered by the Federal Employees Retirement System (FERS).

On October 28, 2019 appellant underwent a right shoulder arthroscopic rotator cuff repair, biceps tenodesis, subacromial decompression, and extensive glenohumeral debridement.

On November 5, 2019 OWCP authorized wage-loss compensation on the supplemental rolls effective October 28, 2019. It authorized wage-loss compensation on the periodic rolls effective January 4, 2020.

On November 5, 2019 OWCP forwarded a FERS/SSA dual benefits calculation worksheet to SSA. On February 19, 2020 the SSA provided OWCP with a February 14, 2020 FERS/SSA dual benefit calculation form. The form indicated that appellant became entitled to retirement benefits, effective November 2018, and that there were no federal earnings to offset.

³ 5 U.S.C. § 8101 *et seq.*

⁴ The Board notes that, following the April 29, 2021 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

In a March 3, 2020 letter, OWCP informed SSA that it was aware that appellant was entitled to retirement benefits effective November 2018. It further noted that he was receiving SSA retirement benefits and that he was covered under FERS. OWCP requested additional confirmation from SSA that there was no offset necessary.

On July 20, 2020 OWCP received a completed FERS/SSA dual benefit calculation form from SSA, which reported that appellant had been in receipt of SSA age-related retirement benefits since November 2018. SSA reported that: beginning November 2018, appellant's monthly SSA rate with FERS was \$2,285.90 and without FERS was \$1,129.80; beginning December 2018, appellant's monthly SSA rate with FERS was \$2,349.80 and without FERS was \$1,161.40; beginning January 2019, appellant's monthly SSA rate with FERS was \$2,355.00 and without FERS was \$1,161.40; and beginning December 2019, appellant's monthly SSA rate with FERS was \$2,392.70 and without FERS was \$1,179.90.

OWCP completed a FERS offset calculation form on August 12, 2020. It calculated the amount that it should have offset from appellant's wage-loss compensation from October 28, 2019 through July 18, 2020. OWCP found that for the period October 28 through November 30, 2019, the daily offset was \$39.35 or \$1,337.88 for 34 days, and for the period December 1, 2019 through July 18, 2020, the daily offset was \$39.98, or \$9,235.94 for 231 days. It added the amounts for each period and determined that it should have offset a total of \$10,573.81 from his wage-loss compensation.

In an August 12, 2020 letter, OWCP informed appellant that it would begin deducting \$1,119.51, the portion of SSA age-related retirement benefits attributable to his federal service, from his periodic compensation benefits.

On August 13, 2020 OWCP notified appellant of its preliminary overpayment determination that he had received an overpayment of compensation in the amount of \$10,573.82 because it had failed to reduce his wage-loss compensation benefits for the period October 28, 2019 through July 18, 2020 by the portion of his SSA age-related retirement benefits that were attributable to federal service. It further advised him of its preliminary determination that he was without fault in the creation of the overpayment. OWCP provided appellant with an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20). Additionally, it notified him that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence, or a prerecoupment hearing.⁵

On September 11, 2020 appellant requested a prerecoupment hearing and completed an overpayment action request form requesting waiver of recovery of the overpayment. He advised that he had used the compensation on necessary expenditures that he would otherwise not have been able to afford and could not repay the overpayment without financial hardship. On the Form OWCP-20 appellant listed total monthly income of \$7,497.00 and total monthly expenses of \$6,444.00. He listed real estate assets of \$80,000.00 and \$90,000.00, with mortgage balances of \$48,700.00 and \$53,700.00, respectively, as well as a vacant lot worth \$3,000.00. Appellant listed

⁵ By decision dated September 14, 2020, OWCP affirmed the August 13, 2020 preliminary overpayment findings. On January 25, 2021 OWCP vacated a September 14, 2020 decision finalizing the preliminary overpayment determination.

other assets totaling \$5,200.00 including \$500.00 in cash, \$1,200.00 in checking, \$500.00 in savings, and stocks and bonds worth \$3,000.00.

On March 5, 2021 OWCP's hearing representative informed appellant of the time and location of his prerecoupment hearing scheduled for April 15, 2021 at 2:45 p.m. Eastern Standard Time (EST) regarding OWCP's August 13, 2020 preliminary finding of the overpayment. It mailed the notice to appellant's last known address of record and provided instructions on how to participate. Appellant did not appear at the hearing or request postponement of the hearing.

By decision dated April 29, 2021, OWCP's hearing representative, after conducting a review of the written record, found that appellant failed to attend the scheduled hearing and failed to request postponement of the hearing. She, therefore, determined that appellant had abandoned his hearing request. OWCP's hearing representative further finalized the preliminary overpayment determination, finding that appellant had received a \$10,573.82 overpayment of compensation from October 28, 2019 through July 18, 2020 because he had concurrently received FECA wage-loss compensation and SSA age-related retirement benefits without the appropriate offset. She also found that appellant was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment as appellant's monthly income of \$7,497.00 exceeded his monthly expenses of \$6,444.14 by more than \$50.00 and as he had assets of approximately \$75,000.00 exceeding the base of \$10,300.00 for an individual with a spouse. OWCP's hearing representative explained that, because he failed to meet both prongs of a two-prong test of whether recovery of the overpayment would defeat the purpose of FECA, it was not necessary to consider waiver of recovery on this basis. She further found appellant had not submitted evidence that he made any financial decision that changed his position for the worse as a result of the receipt of the overpaid benefits and, therefore, had not established that recovery of the debt would be against equity and good conscience.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his or her duty.⁶ Section 8116 limits the right of an employee to receive compensation. While an employee is receiving compensation, he or she may not receive salary, pay, or remuneration of any type from the United States.⁷

Section 10.421(d) of OWCP's implementing regulations requires OWCP to reduce the amount of compensation by the amount of any SSA age-related retirement benefits that are attributable to the employee's federal service.⁸ FECA Bulletin No. 97-09 states that FECA benefits have to be adjusted for the FERS portion of SSA benefits because the portion of the SSA

⁶ 5 U.S.C. § 8102(a).

⁷ *Id.* at § 8116.

⁸ 20 C.F.R. § 10.421(d); *see S.M.*, Docket No. 17-1802 (issued August 20, 2018).

benefit earned as a federal employee is part of the FERS retirement package, and the receipt of FECA benefits and federal retirement concurrently is a prohibited dual benefit.⁹

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly found that appellant received an overpayment of compensation in the amount of \$10,573.82 for the period October 28, 2019 through July 18, 2020 for which he was without fault, because he concurrently received FECA wage-loss compensation benefits and SSA age-related retirement benefits without appropriate offset.

Appellant began receiving SSA age-related retirement benefits in November 2018. OWCP paid appellant wage-loss compensation for total disability following his accepted employment injury beginning October 28, 2019. As noted, a claimant cannot receive FECA compensation for wage-loss and SSA age-related retirement benefits attributable to federal service for the same period.¹⁰ Accordingly, the Board finds that fact of overpayment has been established.¹¹

To determine the amount of the overpayment, the portion of SSA age-related retirement benefits attributable to federal service must be calculated. OWCP received documentation from SSA with respect to the specific amount of SSA age-related retirement benefits that were attributable to federal service. SSA provided the SSA rates with FERS and without FERS for specific periods from October 28, 2019 through July 18, 2020. OWCP set forth its calculations of the amount that should have been offset during the relevant period based on information provided by SSA for the period October 28, 2019 through July 18, 2020.

The Board has reviewed OWCP's calculation of dual benefits received by appellant for the period October 28, 2019 through July 18, 2020 and finds that an overpayment of compensation in the amount of \$10,573.82 was created.¹²

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA¹³ provides that an overpayment must be recovered unless incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience. Thus, a finding that appellant was without fault does not automatically result in waiver of the overpayment. OWCP must exercise its discretion to determine whether recovery of the overpayment would defeat the purpose of FECA or would be against equity and good conscience.¹⁴

⁹ FECA Bulletin No. 97-09 (February 3, 1997). *See also* N.B., Docket No. 18-0795 (issued January 4, 2019).

¹⁰ *Supra* note 8. *See* J.T., Docket No. 21-0010 (issued September 30, 2021); A.C., Docket No. 18-1550 (issued February 21, 2019).

¹¹ *See* S.H., Docket No. 20-1157 (issued December 23, 2020); K.H., Docket No. 18-0171 (issued August 2, 2018).

¹² *See* N.B., Docket No. 20-0727 (issued January 26, 2021); L.L., Docket No. 18-1103 (issued March 5, 2019).

¹³ *Supra* note 3.

¹⁴ J.T., *supra* note 10; G.L., Docket No. 19-0297 (issued October 23, 2019).

According to 20 C.F.R. § 10.436, recovery of an overpayment would defeat the purpose of FECA if recovery would cause hardship because the beneficiary needs substantially all of his or her income (including compensation benefits) to meet current ordinary and necessary living expenses, and also, if the beneficiary's assets do not exceed a specified amount as determined by OWCP from data provided by the Bureau of Labor Statistics.¹⁵

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied waiver of recovery of the overpayment.

As OWCP found appellant not at fault in the creation of the overpayment, waiver must be considered, and repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.¹⁶ It considered his financial information to determine if recovery of the overpayment would defeat the purpose of FECA.

The Board finds that OWCP properly determined that appellant did not require substantially all of his income to meet ordinary living expenses. OWCP found that, after its review of appellant's financial documents of record, he had total current monthly income of \$7,497.00 and total monthly expenses of \$6,444.14, which left more than \$1,052.00 of disposable income with which to repay the debt. As appellant's monthly income exceeds his ordinary and necessary living expenses by more than \$50.00, the Board finds that he did not need substantially all of his income for ordinary and necessary living expenses.

As appellant failed to establish that recovery of the overpayment of compensation would either defeat the purpose of FECA or be against equity and good conscience, the Board finds that OWCP did not abuse its discretion in denying waiver of recovery of the overpayment.¹⁷

LEGAL PRECEDENT -- ISSUE 3

A claimant dissatisfied with a decision on his or her claim is entitled, upon timely request, to a hearing before an OWCP representative.¹⁸ Unless otherwise directed in writing by the claimant, the hearing representative will mail a notice of the time, place, and method of the oral

¹⁵ 20 C.F.R. § 10.436. OWCP's procedures provide that a claimant is deemed to need substantially all of his or her current net income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. Its procedures further provide that assets must not exceed a resource base of \$6,200.00 for an individual or \$10,300.00 for an individual with a spouse or dependent plus \$1,200.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Final Overpayment Determinations*, Chapter 6.400.4a(2) and (3) (September 2018).

¹⁶ *Id.* at § 10.436.

¹⁷ *Supra* note 15. With respect to the recovery of an overpayment, the Board's jurisdiction is limited to those cases where OWCP seeks recovery from continuing compensation benefits. *A.S.*, Docket No. 20-1314 (issued February 23, 2021); *L.L.*, Docket No. 19-0097 (issued March 20, 2020); *A.B.*, Docket No. 18-0915 (issued October 24, 2018). As appellant was not in receipt of continuing wage-loss compensation at the time of OWCP's final overpayment determination, the Board does not have jurisdiction over the method of recovery of the overpayment in this case. *See id.*; *Miguel A. Muniz*, 54 ECAB 217 (2002); *Lorenzo Rodriguez*, 51 ECAB 295 (2000); 20 C.F.R. § 10.441.

¹⁸ *Supra* note 3 at § 8124(b).

hearing to the claimant and to any representative at least 30 days before the scheduled hearing date.¹⁹

A hearing before OWCP's Branch of Hearings and Review can be considered abandoned only under very limited circumstances.²⁰ With respect to abandonment of hearing requests, Chapter 2.1601(g) of OWCP's procedures²¹ and section 10.622(f) of its regulations²² provide in relevant part that failure of the claimant to appear at the scheduled hearing, failure to request a postponement, and failure to request in writing within 10 days after the date set for the hearing that another hearing be scheduled shall constitute abandonment of the request for a hearing. Under these circumstances, the Branch of Hearings and Review will issue a formal decision finding that the claimant has abandoned his or her request for a hearing and return the case to the district office.²³

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly determined that appellant abandoned his request for a prerecoupment hearing.

OWCP's Branch of Hearings and Review received appellant's September 11, 2020 request for a telephonic prerecoupment hearing. In a March 5, 2021 letter, OWCP provided appellant 30 days written notice of the hearing, which was scheduled for April 15, 2021 at 2:45 p.m. EST. It mailed the March 5, 2021 notice of hearing to appellant's last known address of record, and it was not returned as undeliverable. Absent evidence to the contrary, a notice mailed in the ordinary course of business is presumed to have been received by the intended recipient.²⁴ The presumption is commonly referred to as the "mailbox rule."²⁵ It arises when the record reflects that the notice was properly addressed and duly mailed.²⁶ The current record is devoid of evidence to rebut the presumption that appellant received OWCP's March 5, 2021 notice of hearing.

The hearing notice was properly addressed to appellant's last known address of record.²⁷ Appellant did not call-in as instructed for the April 15, 2021 scheduled telephonic hearing and

¹⁹ *Supra* note 8 at § 10.617(b).

²⁰ *R.L.*, Docket No. 20-0186 (issued September 14, 2020); *C.Y.*, Docket No. 18-0263 (issued September 14, 2018); *Claudia J. Whitten*, 52 ECAB 483 (2001).

²¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6(g) (October 2011).

²² *Supra* note 9 at § 10.622(f).

²³ *Id.*

²⁴ *C.Y.*, *supra* note 20; *Kenneth E. Harris*, 54 ECAB 502 (2003).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*; *K.F.*, Docket No. 17-1035 (issued August 24, 2017).

there is no indication that he requested postponement of the telephonic hearing.²⁸ Moreover, he did not submit a written request within the 10 days after the date set for the telephonic hearing and request that another telephonic hearing be scheduled. Under the circumstances, OWCP's hearing representative properly found that appellant abandoned his telephonic hearing request.²⁹

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$10,573.82 for the period October 28, 2019 through July 18, 2020 for which he was without fault, because he concurrently received FECA wage-loss compensation benefits and SSA age-related retirement benefits without appropriate offset. The Board further finds that OWCP properly denied waiver of recovery of the overpayment and that OWCP properly determined that appellant abandoned his request for a prerecoupment hearing.

ORDER

IT IS HEREBY ORDERED THAT the April 29, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 25, 2022
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

²⁸ 20 C.F.R. § 10.622(c).

²⁹ *C.Y.*, *supra* note 20; *M.V.*, Docket No. 17-1795 (issued March 1, 2018).